**Union Carbide Corporation *and* Rex A. King.** Case 9–CA–36332

June 21, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On June 9, 1999, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Union Carbide Corporation, South Charleston, West Virginia, its officers, agents, successors, and assigns shall take the action set forth in the Order.

*Patricia Rossner Fry, Esq.,* for the General Counsel.
*Roger A. Wolfe, Esq.,* for the Company.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case. At the close of a 1-day trial in Charleston, West Virginia, on May 11, 1999, I rendered a Bench Decision in favor of the General Counsel (Government) thereby finding a violation of 29 U.S.C. 158(a)(1). This certification of that Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal (Exceptions) to the National Labor Relations Board. I rendered the Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (Board) Rules and Regulations.

For the reasons stated by me on the record at the close of the trial, and by virtue of the prima facie case established by the Government, a case not credibly rebutted by Union Carbide Corporation (Company), I found the Company violated Section 8(a)(1)[1] of the National Labor Relations Act, as amended, (Act), when on August 28, 1998, it discharged its employee Rex A. King (King) because of his concerted protected activity of raising an issue addressed in a collective-bargaining agreement. *Interboro Contractors*, 157 NLRB 1295 (1966), and *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822 (1984). I rejected the Company's contention that as a probationary employee King had no contractual rights until he completed his probationary period. I also rejected the Company's contention it was justified in discharging King in as much as King's conduct in pursuit of any contract right was "too far out of line" to be protected by the Act. I found *Carolina Freight Carriers Corp*., 295 NLRB 1080 (1989), relied upon by the Company on this point, to be factually distinguishable. Finally, I rejected the Company's contention it was not wrongfully motivated in discharging King. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

I certify the accuracy of the portion of the transcript, as corrected,[2] pages 293 to 313, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Company discriminatorily discharged its employee Rex A. King, I shall recommend he, within 14 days from the date of this Order, be offered full reinstatement to his former job, or if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority, or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, with interest. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New*

[1] We agree with the judge that employee Rex A. King was discharged for pursuing his contract rights. The judge found that King was attempting to find out his continuous service date (CSD), which is used to determine eligibility for contract benefits including vacation and severance. The record, however, shows that King had been informed that his new CSD was July 31, 1977, and that he was attempting to find out whether the contractual provisions allowing employees to take their CSD as a holiday applied to him (i.e., to permit him to take July 31, 1998, as a holiday).

We also agree with the judge that King's conduct was not so "out of line" as to remove him from the protection of the Act, and find that *Carolina Freight Carriers Corp.*, 295 NLRB 1080 (1989), relied on by the Respondent, is distinguishable. In *Carolina Freight*, the Board found that an employee's behavior in asserting a contract right constituted insubordination because he *persisted* in challenging his supervisor's direct order to clock out. Id. at fn. 1. (Emphasis in the original.) In the instant case, King's behavior was at most rude and disrespectful. See *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. 953 F.2d 1384 (6th Cir. 1992).

[1] There was no showing on this record that King's discharge was motivated by any effort to discourage membership in Local Lodge 598 of District Lodge 20, of the International Association of Machinists and Aerospace Workers, AFL–CIO (Union). I note Union President Bowers even participated in the only hiring decisions at the Company in several years. Accordingly, I dismiss the 8(a)(3) allegations of the complaint.

[2] I have corrected the transcript pages containing my decision. The corrections are as reflected in the attached App. C (omitted from publication). The corrections have been made to conform to my intended words, without regard to what I may have actually said in the passages in question.

*Horizons for the Retarded*, 283 NLRB 1173 (1987). I also recommend that the Company, within 14 days from the date of this Order, be ordered to remove from its files any reference to Rex A. King's unlawful discharge and, within 3 days thereafter, notify Rex A. King, in writing that this has been done and that his discharge will not be used against him in anyway. Finally, I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate Notice to Employees, copies of which are attached hereto as "Appendix B"[3] for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these conclusions of law, and on the entire record, I issue the following recommended[4]

ORDER

The Company, Union Carbide Corporation, South Charleston, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Rex A. King full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent job without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, remove from its files any reference to his unlawful discharge, and within 3 days thereafter, notify Rex A. King, in writing that this has been done and his discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents, for its examination and copying, all payroll records, Social Security payment records, time cards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(d) Within 14 days after service by the Regional Director for Region 9 of the National Labor Relations Board, post at its Charleston, West Virginia facility copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice, to all employees in Charleston, West Virginia, employed by the Company on or at any time since August 28, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 9 of the National Labor Relations Board sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

APPENDIX A

DECISION

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JUDGE CATES: This is my decision in the matter of Union

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Carbide Corporation and Rex A. King, an individual, Case 9–CA–36332. First, let me state as part of my decision that I would like to thank Counsel for both sides for having done an outstanding job presenting the evidence in this case. Both Counsel are a credit to the Parties they represent.

The charge in this case was filed by Rex A. King on October 19, 1998 and thereafter timely served on Union Carbide Corporation, the Company herein.

During the past twelve months the Company in conducting its operations of manufacturing chemicals at its South Charleston, West Virginia facility purchased and received at that facility goods valued in excess of $50,000.00 directly from points outside the State of West Virginia.

The evidence establishes, the Parties admit, and I find the Company is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The evidence establishes and I find that Local Lodge 598 of the District Lodge 20 of the International Association of Machinists and Aerospace Workers, AFL–CIO, herein the Union, has been, and is, a labor organization within the meaning of Section 2(5) of the Act.

Certain individuals will be referred to in the decision and I find they are admittedly either supervisors and/or agents of the Company. They are Carla Abshire, a Human Resources employee; Jeff Means, a General Foreman; Mickey

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Garnes, a foreman; and Danny Lawrence, a foreman. All are either supervisors and/or Agents of the Company sufficient to bind the Company for actions they may have taken.

There is a collective bargaining agreement currently in effect between the Company and Union which by its terms is effective from December 15, 1997 to December 17, 2000.

It is clear the Company herein had not exercised an option to hire employees at its South Charleston, West Virginia facility for a number of years. Perhaps in excess of ten years.

During the most recent negotiations between the Company and the Union the Parties negotiated an agreement whereby the Company could hire four or five employees without having to go through the long term training program outlined in the collective bargaining agreement.

As I believe it was Mr. Bowers, the Local Union President, who testified the Company wanted to hire individuals who could hit the road running. That is they would be ready to perform work immediately at a level that was expected of them without having to train the individuals they would hire.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

A decision was made in March of 1998 to do just that. To hire either four or five employees. I am primarily focusing on four employees that were hired into what I shall describe as the Maintenance Department.

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The Company set up an interview process and interviewed and evaluated a number of applicants. The testimony varies as to how many employees were actually interviewed and it's not critical to this decision that I determine with precision the number interviewed and/or hired.

The number interviewed perhaps was at least twelve and one witness said there might have been as many as thirty individuals who had made application or sought to be employed and interviewed.

There were approximately three or four individuals involved in the hiring/interview process, one of which was Local Union President, Bowers, and through a process of rating each of the individuals seeking employment the Company selected four employees that as one witness described were the "cream of the crop." So four individuals were hired one of which was Mr. King, the Charging Party herein.

There is no dispute that Mr. King was hired on or about June 29, 1998 and was terminated on or about August 28, 1998. There is no dispute that the Company has a one hundred and twenty day probationary

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period that had been negotiated with the Union and is spelled out in the Parties' collective bargaining agreement. Any one coming in as a new hire has to go through this one hundred and twenty day probationary period.

The four individuals hired at the end of June 1998 were no exception to that requirement. Each of the four employees, and specifically Mr. King knew they were probationary employees and subject to that period of time.

It is undisputed that Mr. King worked for the Company starting in 1973 I believe the testimony will show and worked at various locations for the Company and perhaps worked up until 1994 or thereabout for the Company, and from 1994 to 1998 Mr. King, from time to time, worked at the Company's facilities as a contract employee for some other company performing work at the Company location herein.

For example, one witness, I believe testified one of the employers they worked for in that capacity was Brown & Root Construction Company.

Next we come to the long journey over a short period of time that Mr. King went through visa vis his relationship with the Company. As both Counsel for the General Counsel and Counsel for the Company indicated, I believe both indicated, that regardless of which set of facts were credited that the outcome would be the same. Both contend the outcome would be the same.

There are differences in the testimony. Some are minor differences. Others are more substantial. I'm

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not unmindful that when people are recalling the same events they will recall them in a slightly different manner than someone else did with each believing, and perhaps rightly so, that they were truthfully recalling what occurred.

With respect to the credibility resolutions that I will make I had the opportunity to watch the witnesses as they testified. I listened to the differences between the accounts of what took place, and I believe that Mr. Garnes testified honestly and completely as best he could.

I believe his testimony to be true for a number of reasons in addition to his appearance as he testified before me. His testimony persuades me that he is a wheeling and dealing supervisor who, for example, would not bat an eye about trading an employee he thought was a trouble maker to somebody else.

He admitted he told supervisor Samples I believe it was that you can have anybody over here with me that you want except you can't have King. He said he knew that Samples would take King because that's just the way Samples was; if he thought you were going to keep somebody he would take them. Garnes acknowledges he engaged in a little deceit with respect to his fellow supervisors when it came to unloading an employee from one department to another.

He candidly admitted I was trading my problems off. I was getting rid of him. He even would tell a supervisor that an

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employee was being transferred out of his department because it was a good job and other employees with more seniority might want that job when he knew the reason the individual was being transferred was because of problems the Company perceived with the individual being transferred, namely in this case, Mr. King.

But, I am persuaded that when Mr. Garnes is pressed to the wall he will acknowledge his faults and tell the truth. I credit Mr. Garnes' version of the events as they pertain to Mr. King.

Mr. King 's long journey starts even before he actually repored for work. Mr. King thought he was supposed to be paid more than his letter of employment indicated he was going to be paid.

More specifically Mr. King testified that he was told he would be paid as a second year employee but when he got his letter inviting him to accept an offer to work with the Company he found out the pay would be somewhat less. The difference being somewhere between $16.00 and change to $17.00 and change. Mr. Garnes testified, and I credit his testimony, that he was not offered more money ahead of time but that when Mr. King raised the matter with him he went back to see if he could get Mr. King the additional money and in doing so he spoke with General Foreman or Maintenance Director Means.

Means told Garnes it was a "take it or leave it" situation. Garnes went back to Mr. King

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and told him he could either take the job at the pay outlined in the letter or they would hire someone else. I credit Mr. Garnes' testimony that Mr. King told him "God damn it I'm not even back on the payroll and you're screwing me."

Mr. Garnes testified that caused him some problems. He thought maybe he might even have a problem with King before he got Mr. King back on the job. Mr. Garnes testified about some safety glasses incidents he had with Mr. King. Garnes testified he observed Mr. King on I believe at least three occasions without safety glasses and when he pointed this out to him Mr. King put his glasses on even though, according to Mr. Garnes, it seemed like he didn't really want to.

The next area where it appears that Mr. King encountered some difficulty at least from Mr. Garnes' point of view was that when Mr. Garnes was explaining the overtime situation to Mr. King and the other employees. Mr. Garnes testified he advised the new hires they could sign up to participate in overtime, and if

they signed up they would be subject to working overtime. Garnes told the new hires if they did not sign up and enough individuals did not sign up they could be drafted to work overtime. Garnes testified Mr. King responded that he might be stuck out there every night. Mr. Garnes told King he would have to make that decision.

Mr. Garnes went on vacation near the end

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of July, perhaps the last week in July 1998 and in Mr. Garnes' place Mr. Derrick Peaks filled in for him. Peaks testified, and I don't think there is any dispute with respect to this, that Mr. King raised with him what his CSD or continuing service date was.

Mr. King had already talked with Mr. Garnes about this. Mr. Peaks called Carla Abshire in the Human Resources Department and ask her about King's CSD. Abshire didn't have a ready answer for Peaks but promised to get an answer. Mr. Peaks conveys that to Mr. King. In fact I believe Mr. Peaks testified that Mr. King was standing right there meaning next to him when he made the inquiry of Human Resources.

Next supervisor Danny Lawrence needs an employee to help out over in his Department. Garnes figures this is a way for him to get rid of his problem so he sends his problem over to Supervisor Lawrence.

Employee King reports to Supervisor Lawrence and he asked Supervisor Lawrence to seek out an answer for him on whether the continuous service date for him would be such that he could take July 31, 1998 as a holiday or exactly when the computation for his continuing service date would be.

Supervisor Lawrence told King he didn't know when it would be computed but tells Mr. King he will check with Human Resources. Lawrence called Carla Abshire and she told him she was already checking on it and would get back to

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him but didn't have an answer at that time.

Lawrence did not want to be troubled with King's problem and did not know what to do so he asked his supervisor, Cliff Samples, what to do. Samples told Lawrence he didn't think anything could be done about it until Mr. King had been reemployed for at least six months. Supervisor Lawrence conveyed that to Mr. King.

Supervisor Lawrence said that that was the first time it had ever been mentioned to him. Now that's contrary to Mr. King's testimony but, I am persuaded that Mr. Lawrence's testimony falls into a pattern and I credit his testimony on that point.

Mr. Lawrence does give Mr. King some advice. He tells him, and I believe this to be a quote, "Rex, lay off this. Everybody in the Plant knows about it. Don't make no more trouble until you get a hundred and twenty days in."

Lawrence gets word he is to send King back to Garnes, but in the meantime on August 17th or thereabout, 1998, an employee named Plumley speaks with Supervisor Lawrence about Charging Party King's problems. According to Lawrence, Plumley tells him he is trying to help out a good employee. that he doesn't want him to get messed over and doesn't want anything to happen to him. I'll pick up more on this in a minute.

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Before I get to King reporting back to Garnes on or about August 17, 1998, Lawrence testified he had observed King in a mandatory hard hat area, on three separate occasions, with only a baseball or soft type cap on. On two of the occasions he did not speak to King, but the third time as they were walking along together between jobs he told King you need to wear your hard hat in this area.

Apparently there was some employee at Union Carbide or at the Company herein, that made it her point to observe any safety violations and speak to the proper persons if she observed anyone not observing the safety regulations.

As indicated earlier King reported back to Garnes on or about August 17, 1998. King tells Garnes this "continuing service date" thing has kindly gotten blown out of proportion and he would like for it to settle down.

Garnes testified he told King that if anybody had blown it out of proportion it was King by his continually raising his CSD problem and advised King to let the system work its way out and eventually it would resolve itself.

Garnes told King about Supervisor Lawrence being brought into the situation. Garnes told King that as soon as King had gotten over to Lawrence's area he had brought up this continuing service date problem and King, according to Garnes, whose

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testimony I credit, said "Danny (meaning Lawrence ) is a fucking liar."

Garnes testified about a meeting on August 18, 1998 when he was making his rounds where at he talked with King and employee Plumley. According to Garnes' testimony, Plumley told him that he had spoken with Lawrence as an Alternate Steward in order to help King out. Plumley did not testify in that manner. Lawrence did not say that Plumby had come to him as an Alternate Steward, but I am persuaded it was communicated to Garnes by Lawrence, or others, that that's what had taken place at that meeting.

Thereafter on August 28th King is terminated. Supervisor Garnes testified that on this day he gave everyone a job assignment except King and that King wanted to know what was going on. Garnes told King they needed to go talk with Supervisor Means over in the Human Resources Department They did so. Garnes testified he signed a letter and gave it to King. The two of them told King he was terminated. Garnes walked King to his vehicle and retrieved his vehicle pass and his personal pass. King again wanting to know why he was being terminated, and Mr. Garnes told him he could not talk about it.

Mr. Means testified he was the one who made the decision to terminate Mr. King and that he did so for a number of reasons. He said he was aware of and it factored into

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his decision that Mr. King did not wear his safety glasses on at least three occasions, and that Mr. King kept magnifying and raising the problem about his continuous service date. In fact Mr. Means said he spent more time on that issue than he did with anything else from anyone else during that period of time. He said this problem with Mr. King's continuous service date came up constantly in the Human Resources Department.

Means said that although he transferred Mr. King to Mr. Lawrence's department he transferred him back because he didn't want Mr. King to get lost in the shuffle. That he wanted to be able to keep a close eye on Mr. King and if necessary document a case on which Mr. King could be removed from the Company because he had started having doubts about Mr. King when Mr. King first made comments about the Company not treating him kindly with respect to his rate of pay before he was hired.

Mr. Means said he terminated Mr. King because his behavior was disruptive regarding his seeking a status on his continuous service date. That it involved three Human Resources Representatives he had contacted. He was tying up everyone's time. Means testified it was a complicated issue and that Mr. King simply would not cease and desist and let the system work.

Means said he also took into consideration the fact that Mr.

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King made the comments I find he made about Supervisor Lawrence being a fucking liar, and that overall Mr. King had a negative attitude and he terminated him.

Now applying those facts to the law did the Company violate the Act when it discharged Mr. King on August 28, 1998. There are at least two series or sets of cases I wish to call your attention to and then apply those particular holdings to this case.

First any case that turns on an employer's motivation needs to be analyzed under the teachings of the Board 's decision in Wright, W-r-i-g-h-t, Line, L-i-n-e, a Division of Wright Line, Inc., 251 NLRB 1083.

The Board 's analytical mold for determining whether the General Counsel has made out a violation of Section 8(a)(3) and (1) violation as alleged in this Complaint, or a Section 8(a)(1) as it appears is the Government's contention in this case, turns on whether a prima facia case of unlawful motivation has been proven by the General Counsel and, if so, whether the Company has demonstrated that it would have acted the same regardless of any protected activity on the part of the individual, in this case, Mr. King.

The Wright Line test was reviewed by the Supreme Court in NLRB v. Transportation Management Corporation, 462 U.S. 393 and the Court approved the Board's so called dual motive analysis.

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Although I might note that the Board in the Wright Line decision used the term "prima facia" four times, the Supreme Court's Transportation Management opinion did not employ that term at all.

The Court described the formula that it affirmed as "[t]he employee had the burden of persuading the NLRB that antiunion animus contributed to the employer's firing decision; The burden then shifted to the employer to establish as an affirmative defense that it would have fired the employee for permissible reasons even if the employee had not been involved in Union activity".

In order to establish the Wright Line burden the Government must show that there was union or protected activity, that the Employer had knowledge of it. Consideration must be given to the timing of the events, and whether there is employer animus, and sometimes perhaps even something a little less than that, but I shall look to those four elements in the current case.

Secondly, a series of cases that perhaps needs to be looked at is what is sometimes referred to as the Board 's Interboro doctrine. That is spelled I-n-t-e-r-b-o-r-o. The Board outlined its doctrine in a case reported at 157 NLRB 1295, a 1966 case.

Now the Board 's Interboro doctrine was affirmed by the United States Supreme Court in NLRB v. City Disposal Systems,

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Inc., 465 U.S. 822, a 1984 case. The Interboro doctrine boiled down to its simplest premise is that an employee is engaged in protected activity when he or she raises issues addressed in a collective bargaining agreement

It is also Board law that an employee in pursuing rights under a collective bargaining agreement or invoking the collective bargaining agreement need not be correct in his or her interpretation of the contract in order to invoke it or to file a grievance. It's just that the contentions of the party seeking to invoke the privileges of contract must be reasonably
based on the contract.

Was there a contract provision involved in this case. The answer is yes. The collective bargaining agreement at, among other places, Article 15, Section 15.1(c) addresses company service time utilized for benefits purposes and is defined by UCC Corporate policy meaning the Company's policies, as testified to by a Company witness herein.

So when Mr. King was attempting to find out his continuous service date he was pursuing a matter that is covered by the collective bargaining agreement. He was trying to invoke the privileges outlined for him and others in the collective bargaining agreement, therefore the conduct that Mr. King was engaging in was conduct protected by the Act as stated in the Board's Interboro doctrine and as affirmed by the United States Supreme Court in

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City Disposal Systems, Inc. There is no question that the first part of the elements the Government must meet has been met.

The General Counsel established the conduct Mr. King engaged in was protected by the Act. Did the Company have knowledge this was an item protected by the Act that Mr. King was raising or invoking. Absolutely. The Employer negotiated with the Union the contract that contained a provision that dealt with continuous service dates and the contract simply refers to the policies the Company had on that matter as controlling.

The timing is very pertinent. Mr. King did not make it out of his probationary period before he was discharged for, among other reasons, invoking the contract, a protected activity.

Did the Company take adverse action against King. Yes, they discharged him. The Government has met its burden of establishing a prima facia case in the matter herein.

I turn now to the Company's defenses. Did the Company establish that it would have discharged Mr. King even in the absence of any protected conduct on his part. I find, for the following reasons, the Company failed to establish that it did so.

First there is no question in this case on the facts before me but that Mr. King performed his job in a very

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satisfactory if not an outstanding manner.

Mr. King's complaining about the rate of pay that he would be paid even in the language that he complained was not language sufficient to remove him or his conduct from the protection of the Act. In the give and take of labor relations and in the give and take of communication between employees and between employees and supervisors is sometimes a little rougher than would be in the ordinary discourse between individuals.

Each of the items that the Company said they discharged Mr. King for in my opinion were all colored by and seized upon to bolster the bottom line reason for his discharge, namely that he was constantly and consistently pursuing what he perceived to be a right under the collective bargaining agreement.

The fact that he, in no uncertain terms said, a supervisor wasn't speaking the truth does not remove Mr. King from the protection of the Act.

The fact that this (CSD) was a complicated issue is demonstrated by the fact it took the Company an extremely long time into 1999, perhaps as late as February of 1999, to resolve exactly how one computed a continuous service date. Part of that can be understood because this Company had not hired employees in a number of years, perhaps in excess of ten. Also they had not had an opportunity

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apparently to rehire someone that had been off for a long period of time and to consider their continuing service date.

In fact I believe the Company's documents will show that the final and persuasive factor in this matter was a piece of correspondence from I guess the Central Office of the Company in which the individual said it would be such and such date and that's how the Company arrived at Mr. King's date.

Now in finding that the Company failed to meet its burden that it would have discharged Mr. King even in the absence of any protected conduct on his part I do not mean to imply that Mr. King didn't spend some of his time constantly raising the issue, and I'm sure that it became annoying to the Company but it still was insufficient to remove him from the protection of the Act.

Perhaps Mr. King—would have been better advised to have pursued it with less vigor. It's apparent that Mr. King was very interested in when he could get a vacation, when he could get a day off, when he could be some place else with pay but in all that activity Mr. King stayed within the frame work of the protection of the Act because he was legitimately pursuing, with a reasonable basis, a determination on his continuing service date.

Absent his having done that I'm fully persuaded the Company would not have discharged Mr. King. The other factors

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would not have brought about his discharge. For example the warning early in his employment to get his safety glasses although he resented doing so would not have brought about his termination.

The fact that he was warned about getting his hard hat on instead of his baseball cap, or the fact that he may not have been candid with his supervisors as to how many times he had raised this continuing service date with various persons connected with Management would not have brought about his discharge I'm fully persuaded that absent his pursuing the CSD issue he would not have been discharged.

Accordingly, I shall order the Company to reinstate Mr. King to his previous job and if his previous job no longer exists to substantially equivalent employment without loss to his seniority or other privileges and to make him whole for any earnings he may have lost, and to post an appropriate notice.

I shall prepare and serve on the Parties a certification of my decision as soon as I receive a copy of the transcript from the Reporting Agency. I will certify those pages of the transcript constituting my decision.

I will make any corrections that are necessary and then serve it on the Parties. It is my understanding that the appeals period runs from that time but please be governed by the Board's Rules and Regulations rather than my understanding of them because you will always be in better stead.

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Let me again say that I urge the Parties still to resolve this matter. There may be some grounds that you can resolve it on and not have to proceed any further with it. If you're unable to do so the appeals process is outlined in the Board's Rules and Regulations.

Let me state that it has been a pleasure to be in Charleston, West Virginia in this gorgeous restored Court Room on the banks of a river whose names escapes me at the present and in the shadows of the Robert Byrd Federal Building across the street, and with that this trial is closed.

(Off the record.)

(Whereupon, the hearing in the above entitled matter was closed.)

## APPENDIX B

### NOTICE TO EMPLOYEES
Posted by the Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid and protection
To choose not to engage in any of these concerted activities

WE WILL NOT discharge employees for engaging in protected concerted activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Rex A. King full reinstatement to his former job, or if his job no longer exists to a substantially equivalent job without prejudice to his seniority or other rights or privileges previously enjoyed; and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this Order remove from our files any reference to his unlawful discharge, and within 3 days thereafter, notify Rex A. King, in writing that this has been done and his discharge will not be used against him in any way.

UNION CARBIDE CORPORATION